A

MARLAN MARPAUNG

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
AZHAR MA'AH JCA
CLEMENT SKINNER JCA
[CRIMINAL APPEAL NO: B-05-16-2011]

C

20 AUGUST 2012

CRIMINAL PROCEDURE: *Defence - Shift in defence - Accused on drug trafficking charge changed stand to contend drugs belonged to co-accused who was acquitted and discharged - Accused during entire*

D

prosecution's case maintained drugs belonged to someone else who had escaped - Whether change in stand destroyed accused's credibility and bona fides of defence - Whether accused should have raised issue of ownership of drugs at earliest opportunity when arrested with co-accused, when interrogated or during prosecution's case - Whether accused's conduct at

E

time of arrest showed he knew of drugs in bag

The appellant ('accused') was found guilty and sentenced to death by the High Court for trafficking in 1,843g cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The same court acquitted and discharged him and a woman ('Paridah') of another joint charge of trafficking in 2,686g cannabis. The accused appealed to the Court of Appeal against conviction and sentence. According to the prosecution's evidence, a police party acting on a tip-off were waiting in ambush near a restaurant when they noticed the accused carrying a plastic bag ('P24') and walking with Paridah towards the restaurant. When the members of the police party approached them, identified themselves and attempted to arrest the duo, the accused put up a struggle and tried to flee but was overpowered. Paridah was also arrested. The police found the cannabis in P24. When his defence was called, the accused told the court that he had met Paridah earlier in the evening on the day in question and both of them went to a restaurant to dine. While they were eating he said Paridah received a call on her handphone and she requested the caller to come to the restaurant. She then asked the accused to go to the room where she lived to fetch P24 using her house keys. He said whilst

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walking back to the restaurant with P24 he saw Paridah walking on the same road accompanied by two persons on a motorcycle who were riding slowly alongside her. When he handed P24 to Paridah, she, in turn, handed it to the persons on the motorcycle. At that time the accused heard someone shout 'police' and the persons on the motorcycle threw P24 to the ground and fled while both he and Paridah were arrested. The accused's defence was that he was an innocent carrier.

Held (unanimously dismissing the appeal)
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) The High Court had rightly made an affirmative finding based on the evidence that the appellant had *mens rea* possession of the drugs before resorting to invoke the presumption of trafficking under s. 37(da)(vi) of the DDA and calling on the accused to enter his defence. Once the elements of possession had been proved, the compelling presumption of trafficking had to be invoked. (paras 31 & 32)

(2) The accused could not avail himself of the defence of innocent carrier because there was ample evidence to show he had knowledge of the drugs he was carrying. His contemporaneous conduct by fleeing the scene and putting up a struggle with the police party before the drugs were discovered had a direct bearing on the facts in issue and damaged and whittled away the presumption of innocence on his part. (para 34)

(3) The accused sprung a surprise when he said P24 belonged to Paridah. This version was only brought up when the accused was called upon to enter his defence after he and Paridah were acquitted and discharged without their defence being called on the joint charge and he, facing the charge alone, took a 180-degree turn and pushed all the blame onto Paridah. During the entire prosecution's case the defence had suggested the drugs belonged to someone else who had escaped but certainly not to Paridah. (paras 35 & 36)

(4) If it was true the drugs belonged to Paridah and that he was asked to take P24 from her room, this defence should have been raised at the earliest possible stage and ought to have been categorically and specifically put to the prosecution's

witnesses to test the veracity of the accused's version. It ought to have been raised at the first instance when he was arrested or when he was thereafter interrogated or during the entire prosecution's case. The introduction of this contradictory version at such a late stage impacted on the accused's credibility and destroyed the *bona fides* of his entire defence. (paras 35, 40 & 37)

(5) There was no mix-up of the cannabis forming the subject-matter of the two charges by the government chemist in the carrying out of her analysis of the drugs. (para 41)

(6) The accused's defence was improbable and incapable of belief; it fell far short of rebutting the presumption of trafficking on a balance of probabilities and did not raise a reasonable doubt as to his guilt which the prosecution had established beyond reasonable doubt. (para 46)

Bahasa Malaysia *Translation Of Headnotes*

Perayu ('tertuduh') didapati bersalah dan dihukum mati oleh Mahkamah Tinggi bagi pengedaran 1,843g kanabis di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Mahkamah yang sama melepaskan dan membebaskan tertuduh dan seorang wanita ('Paridah') daripada satu lagi pertuduhan bersama bagi pengedaran 2,686g kanabis. Perayu merayu ke Mahkamah Rayuan terhadap sabitan dan hukuman. Menurut keterangan pihak pendakwaan, pasukan polis bertindak atas maklumat sedang menunggu untuk menyerang hendap berhampiran sebuah restoran apabila mereka melihat tertuduh membawa satu beg plastik ('P24') dan berjalan dengan Paridah ke arah restoran tersebut. Apabila ahli pasukan polis menghampiri mereka, memperkenalkan diri mereka dan mencuba untuk menangkap mereka berdua, tertuduh bergelut dan cuba melarikan diri tetapi tidak berjaya. Paridah juga ditangkap. Polis menemui kanabis di dalam P24. Apabila pembelaannya dipanggil, tertuduh memberitahu mahkamah bahawa dia telah bertemu dengan Paridah sebelum itu di sebelah petang pada hari tersebut dan kedua-dua mereka pergi ke sebuah restoran untuk makan. Semasa mereka sedang makan, dia menyatakan bahawa Paridah menerima satu panggilan ke telefon bimbitnya dan dia meminta pemanggil datang ke restoran tersebut. Dia kemudian meminta tertuduh pergi ke bilik di mana dia tinggal untuk mengambil P24 menggunakan kunci rumahnya. Tertuduh menyatakan bahawa semasa berjalan balik ke restoran dengan P24

dia nampak Paridah berjalan di jalan yang sama diiringi oleh dua orang dengan motosikal yang ditunggang dengan perlahan di sebelah Paridah. Apabila tertuduh menyerahkan P24 kepada Paridah, dia sebaliknya menyerahkannya kepada orang di atas motosikal. Pada ketika itu tertuduh terdengar seseorang menjerit 'polis' dan orang di atas motosikal membaling P24 ke atas tanah dan melarikan diri sementara dia dan Paridah ditangkap. Pembelaan tertuduh adalah bahawa dia adalah pembawa tidak bersalah.

Diputuskan (menolak rayuan)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah Tinggi telah membuat dapatan yang betul berdasarkan kepada keterangan bahawa perayu mempunyai milikan *mens rea* dadah sebelum beralih untuk membangkitkan anggapan pengedaran di bawah s. 37(da)(vi) ADB dan memanggil tertuduh membela diri. Sebaik sahaja unsur-unsur milikan telah dibuktikan, anggapan pengedaran yang mendesak perlu dibangkitkan.

(2) Tertuduh tidak boleh menggunakan pembelaan pembawa tidak bersalah kerana terdapat keterangan yang kukuh untuk menunjukkan bahawa dia mempunyai pengetahuan tentang dadah yang dibawanya. Tindakan semasanya melarikan diri dan memulakan pergelutan dengan pasukan polis sebelum dadah ditemui mempunyai impak secara langsung kepada fakta dalam isu dan telah memusnahkan dan mengikis anggapan ketidakbersalahan terhadapnya.

(3) Tertuduh memberikan kejutan apabila dia menyatakan bahawa P24 adalah kepunyaan Paridah. Versi ini hanya dikemukakan oleh tertuduh apabila dia dipanggil membela diri selepas dia dan Paridah dibebaskan dan dilepaskan tanpa dipanggil membela diri atas pertuduhan bersama dan dia menghadapi pertuduhan tersebut sendiri, selepas mana beliau menterbalikkannya dan meletak kesemua kebersalahan kepada Paridah. Di keseluruhan kes pihak pendakwaan, pembelaan telah menyarankan bahawa dadah tersebut kepunyaan seorang yang lain yang telah melarikan diri tetapi bukan kepunyaan Paridah.

(4) Jika benar dadah tersebut adalah kepunyaan Paridah dan bahawa dia telah diminta mengambil P24 dari bilik Paridah, pembelaan ini sepatutnya dibangkitkan pada peringkat yang

seawal mungkin dan sepatutnya secara khususnya dikemukakan kepada saksi-saksi pihak pendakwaan untuk menguji kebenaran versi tertuduh. Ia juga sepatutnya dibangkitkan pada kali pertama apabila dia ditangkap atau apabila dia kemudiannya disoalsiasat atau semasa kes pihak pendakwaan. Pengenalan versi yang bercanggah ini, di peringkat yang lewat, memberikan kesan terhadap kredibiliti tertuduh dan memusnahkan bona fide keseluruhan pembelaannya.

(5) Tidak ada kekeliruan tentang kanabis yang menjadi subjek perkara kedua-dua pertuduhan oleh ahli kimia kerajaan dalam menjalankan analisis terhadap dadah tersebut.

(6) Pembelaan tertuduh tidak berkemungkinan dan tidak boleh dipercayai; ia gagal mematahkan anggapan pengedaran atas imbangan kebarangkalian dan tidak membangkitkan keraguan munasabah berkaitan dengan kebersalahannya yang mana pihak pendakwaan telah buktikan melampaui keraguan munasabah.

Case(s) referred to:
Aedy Osman v. PP [2011] 1 CLJ 273 FC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Hoh Bon Tong v. PP [2010] 5 CLJ 240 CA ***(refd)***
Ho Seng Seng v. Rex [1951] 1 LNS 25 HC ***(refd)***
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC ***(refd)***
Muhammed bin Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Ouseng Sama-Ae v. PP [2010] 6 CLJ 416 CA ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Badrulsham Baharom [1987] 1 LNS 72 HC ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
Ridwan v. PP [2010] 4 CLJ 570 CA ***(refd)***
Tan Kim Ho & Anor v. PP [2009] 3 CLJ 236 FC ***(refd)***
Teng Howe Sing v. PP [2009] 3 CLJ 733 FC ***(refd)***
Wong Vui Chin v. PP [2011] 3 CLJ 383 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(da)(vi), 39B(1)(a), (2)
Evidence Act 1950, s. 8
Penal Code, s. 34

For the appellant - T Vijayandran; M/s T Vijay & Co
For the respondent - Kwan Lisa; DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45-31-2008]

Reported by Ashok Kumar

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] Marlan Marpaung - the appellant herein, was charged in relation to Criminal Trial No: 45-31-2008 (hereinafter referred to as the "first charge") for trafficking in dangerous drugs, to wit, cannabis weighing 1,843g, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA") and punishable under s. 39B(2) of the DDA. The charge (exh. "P3") against the appellant reads as follows:

> Bahawa kamu pada 13 February 2008 jam lebih kurang 10.00 malam di tepi Jalan Kem, Pelabuhan Klang, di dalam Daerah Klang, di dalam Negeri Selangor Darul Ehsan, telah didapati mengedar dadah berbahaya seberat 1843 gram Cannabis dan oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] In Criminal Trial No: 45A-171-2009 (hereinafter referred to as the "second charge"), the appellant together with Paridah Wahid were charged, with common intention, for trafficking in dangerous drugs, to wit, cannabis weighing 2,686g, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA") and punishable under s. 39B(2) of the DDA read with s. 34 of the Penal Code. The charge (exh. "P2A") against the appellant and Paridah Wahid read as follows:

> Bahawa kamu lanjutan dari niat bersama pada 13 February 2008 jam lebih kurang 11.30 malam bertempat di bilik No: 4, Tingkat 2, di alamat No: 137, Jalan Kem, Pelabuhan Klang, di dalam Daerah Klang, di dalam Negeri Selangor Darul Ehsan, telah memperedar dadah berbahaya iaitu 2686 gram Cannabis dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

[3] Upon the request of the parties, the learned Judicial Commissioner ("JC") heard the first charge and the second charge jointly. At the end of the prosecution's case, in regard to the first charge, the learned JC found that the prosecution had succeeded in proving a *prima facie* case against the appellant and Her Ladyship then called for his defence. In regard to the second

charge, the learned JC found that the prosecution failed to establish a *prima facie* case against the appellant and Paridah Wahid, and Her Ladyship accordingly acquitted and discharged them without calling for their defence. The prosecution filed an appeal in regard to the acquittal and discharge of the appellant and Paridah Wahid pertaining to the second charge but subsequently the prosecution withdrew their appeal.

[4] In regard to the first charge, the appellant gave evidence on oath and he called Muthiah a/l Karupaya (SD2) as his witness. At the close of the defence case, the appellant was convicted and sentenced to death as mandated by the law. Aggrieved, the appellant appeals to this court against the conviction and sentence.

[5] This judgment concerned the first charge only.

The Prosecution's Case

[6] In narrating the facts, it is inevitable that reference to Paridah Wahid will be made.

[7] On 13 February 2008 at about 8pm, ASP Norasib bin Hj Mamat (SP1), a senior police officer attached to the narcotics division of the Police Contingent Headquarters at Selangor, briefed 15 police personnel in regard to an active drug trafficking syndicate dealing in cannabis that operated in the area of Pelabuhan Klang, Selangor. In that briefing, SP1 arranged a strategy to curb the activity of the drug trafficking syndicate. After the briefing, SP1 together with the 15 police personnel proceeded to Jalan Kem, Pelabuhan Klang in separate motor vehicles. On arrival, SP1 directed his police personnel to take up ambush positions and waited. SP1 together with ASP Mohd Hosni bin Manaf (SP7) took up positions in a motor car that was parked not far from an Indian restaurant and there they waited and observed.

[8] About 10 to 15 minutes later, SP1 saw the appellant and Paridah Wahid walking by the side of the road along the row of shop houses at Jalan Kem (hereinafter referred to as the "first place of incident") towards an Indian restaurant. Both of them were seen behaving in a suspicious manner. At that point of time, SP1 saw the appellant carrying a black plastic bag (exh. "P24") in his right hand. SP1 then gave directions to his police personnel to be ready in order to ambush both the appellant and Paridah

Wahid. SP1 accompanied by SP7, Detective Sergeant Palani and Detective Lance Corporal Lasia then approached both the appellant and Paridah Wahid and introduced themselves as police personnel. When SP1 attempted to arrest the appellant, a struggle ensued between the appellant and the police party. As a result of the struggle, the black plastic bag (exh. "P24") that was held by the appellant slipped from the right hand of the appellant and it fell on the road near to the appellant. Thereafter, the appellant made an attempt to run but SP1 assisted by SP7 succeeded in arresting the appellant not far from the place of incident. Whereas Paridah Wahid was arrested by Detective Lance Corporal Lasia with the assistance of Detective Sergeant Palani. As soon as the appellant was arrested, he was physically examined by SP1 but nothing incriminating was found on him. Likewise Detective Lance Corporal Lasia physically examined Paridah Wahid and nothing incriminating was found on her. SP1 then picked up the black plastic bag (exh. "P24") that slipped from the right hand of the appellant and examined its contents in the presence of the appellant and Paridah Wahid and the police party. In the black plastic bag (exh. "P24"), SP1 found two compressed dried leaves suspected to be cannabis wrapped in a yellow cellotape (exh. "P4B") with original wrappers (exh. "P25", "P26", "P27" and "P28"). SP1 also seized a bunch of keys (exh. "P18A to D") from the right pocket of the appellant's trousers. Three handphones (exh. "P15A to C") were seized from the appellant and Paridah Wahid.

[9] The evidence of SP1 was corroborated in material particulars by SP7.

[10] In due course, Maimonah binti Sulaiman (SP5)–the government chemist, analysed the two compressed dried leaves found in the black plastic bag (exh. "P24") and confirmed that they were cannabis, a dangerous drug, within the meaning of s. 2 of the DDA weighing 1843g. That would be in relation to the episode at the first place of incident which formed the first charge.

[11] In regard to the second charge, we will briefly set out the facts that led to the subsequent seizure of the drugs. On 13 February 2008, at about 11.30pm, SP1 was taken by the appellant and Paridah Wahid to room no: 4, second floor, at no: 137, Jalan Kem, Pelabuhan Klang. This was as a result of the fact that a bunch of keys were found from the right pocket of the appellant's trousers. Upon examination of room no: 4, another

three compressed slabs of dried leaves suspected to be cannabis wrapped in yellow cellotape were found outside room no: 4's window - on the extended awning attached to the window. Again, two compressed slabs of dried leaves suspected to be cannabis wrapped in yellow cellotape were found in a transparent plastic bag whilst another compressed slab of dried leaves suspected to be cannabis was found in a box bearing "Happy New Year" label (hereinafter referred to as the "second place of incident"). According to SP1, both the appellant and Paridah Wahid were in a flurry ("gelabah") and in fear ("ketakutan") when these slabs of dried leaves suspected to be cannabis were found. In due course, SP5 analysed and confirmed that the compressed slabs of dried leaves found in room no: 4 were cannabis, a dangerous drug, within the meaning of s. 2 of the DDA weighing 2686g. That would be in relation to the episode at the second place of incident which formed the second charge.

The Defence Of The Appellant In Regard To The First Charge

[12] Our focal point of concern is the defence of the appellant pertaining to the first charge. Under oath, this was what the appellant testified.

[13] That the appellant is an Indonesian citizen working as a sailor with a shipping company operating between Tanjong Balai Asahan, Indonesia with Malaysia. On the date and time as per the first charge, the appellant was at Pelabuhan Klang because the ferry of the shipping company where the appellant was working, broke down.

[14] On 13 February 2008 at about 7pm, the appellant received a telephone call from Paridah Wahid who wanted to send some items to be taken to her family members in Indonesia. For this purpose, the appellant went to room no: 4, second floor at no: 137, Jalan Kem, Pelabuhan Klang, Selangor to meet Paridah Wahid. There, the appellant met two male persons, one of whom the appellant knew as "Ateng" who worked in a ship ferrying vegetables operating from Pelabuhan Klang to Tanjung Balai. While the other male person was not known to the appellant. According to the appellant, he did not enter room no: 4 but waited outside the premises. Once the male persons left the premises, Paridah Wahid invited the appellant to eat out.

[15] The appellant and Paridah Wahid then walked towards an Indian restaurant at Jalan Kem and they entered the said restaurant and sat near one of the tables there. A male Indonesian by the name of Songkait Sellain was also in the said restaurant. While eating, they all watched television in the said restaurant. At about 9pm, Paridah Wahid's handphone rang and she answered the call. According to the appellant, he overheard Paridah Wahid telling the caller that she was eating and she requested the caller to come to the said restaurant. After Paridah Wahid had ended her telephone conversation, she asked the appellant to go to room no: 4 to fetch a black plastic bag (exh. "P24") which was hung behind the door to room no: 4 at the second floor of no: 137, Jalan Kem, Pelabuhan Klang, Selangor. Dutifully the appellant complied and went to room no: 4 alone. Using the key that was given to him by Paridah Wahid, the appellant opened the door to gain access to room no: 4 to enable him to collect the black plastic bag (exh. "P24") which was hung behind the door to room no: 4 which Paridah Wahid requested him to take. After having taken the black plastic bag (exh. "P24"), the appellant went back to the same Indian restaurant to hand the black plastic bag (exh. "P24") to Paridah Wahid. While walking towards the same Indian restaurant with the black plastic bag (exh. "P24"), the appellant saw Paridah Wahid walking on the same road accompanied by two of her friends - a male and a female who were riding a motor scooter slowly. The appellant then handed the black plastic bag (exh. "P24") to Paridah Wahid who in turn handed it to one of the persons who rode the said motor scooter.

[16] At the stage of handing over the black plastic bag (exh. "P24") by Paridah Wahid to the motorcyclist, the appellant heard someone shouted, "Polis ... jangan lari!". Suddenly the appellant saw the person who rode the motor scooter threw the black plastic bag (exh. "P24") to the ground and fled with the motor scooter. Both the appellant and Paridah Wahid were then arrested.

[17] SD2 went to the scene of the crime in October 2010 alone and used the photographs taken by the police as well as the keys to it as guidelines for him to take more photographs. SD2 was directed by Encik Gerald to capture more photographs of the

scene of the crime. It must be borne in mind that the first charge was dated 13 February 2008 and SD2 went to the scene of the crime two years and eight months later to take more photographs.

Analysis

[18] Before us, only three issues were raised, namely:

(a) Whether the learned JC had rightly made an affirmative finding of possession before resorting to the presumption of trafficking under s. 37(da)(vi) of the DDA in calling the appellant to enter his defence?

(b) Whether the defence of innocent carrier was adequately considered by the learned JC?

(c) Whether there was a basis that the government chemist (SP5) had mixed up the cannabis found at the road side of Jalan Kem as per the first charge with the cannabis found in room no: 4, Tingkat 2, no: 137, Jalan Kem, Pelabuhan Klang, Selangor as per the second charge?

The First Issue

[19] The prosecution's case hinged on the evidence of SP1 which was corroborated by SP7. It is a straightforward case where the appellant was seen carrying a black plastic bag (exh. "P24") in his right hand while walking along Jalan Kem with Paridah Wahid. The police party led by SP1 laid an ambush and in the course of effecting an arrest, the appellant put up a struggle and the black plastic bag (exh. "P24") slipped from the appellant's right hand and it dropped to the ground. The appellant then made an attempt to run, but it was shortlived. The appellant was arrested by SP1 assisted by SP7 not far from the place of incident. In our judgment, knowledge that the appellant knew that he was carrying the dangerous drugs in the black plastic bag (exh. "P24") can be inferred from the appellant's act of fleeing. The circumstances here showed that when the police party introduced themselves as police personnel, that introduction triggered the conduct of the appellant in putting up a struggle and in fleeing. There was certainly a nexus between the appellant's conduct and the offence. Such conduct is admissible under s. 8 of the Evidence Act 1950 (*PP v. Chia Leong Foo* [2000] 4 CLJ 649 HC).

[20] Learned defence counsel conceded that the prosecution witnesses testified during the prosecution's case that the appellant resisted arrest and attempted to flee. This is, according to learned defence counsel, *prima facie* evidence of *mens rea* possession. We agree with him. And we may add that knowledge is an essential element of possession (*PP v. Badrulsham Baharom* [1987] 1 LNS 72 HC).

[21] It was SP1 who retrieved the black plastic bag (exh. "P24") that fell to the ground and upon examination found two compressed dried leaves which SP5 confirmed to be cannabis.

[22] There are two core components of possession, namely, the physical element and the mental element. It is not that difficult to prove the physical element as it all depends on the facts of each particular case. However, it is a real challenge to prove the mental element of possession. As Thomson J said in *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] 22 MLJ 237, at p. 239:

> Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

[23] Thomson J further added in *Chan Pean Leon's* case that (see p. 239 of the report):

> Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite.

[24] When custody or control of anything whatsoever containing any dangerous drug is proven, then possession can easily be established. According to Taylor J in *Leow Nghee Lim v. Regina* [1955] 1 LNS 53; [1956] 22 MLJ 28, at p. 29:

> You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession.

[25] And according to Brown Acting CJ in *Ho Seng Seng v. Rex* [1951] 1 LNS 25; [1951] 17 MLJ 225, at p. 226:

> I think that the element of knowledge is implicit in the word 'custody' and in the word 'control'. 'Custody' means watching over or keeping safe. You cannot watch over a thing or keep it safe unless you know it is there. Similarly you cannot have 'control' of a thing unless you know it is there.

[26] Here, the learned JC has lucidly described in fine language how the appellant was found to be in custody and control of the proscribed drugs based on the established factual matrix tied up with the surrounding circumstances of the case. At p. 427 of the appeal record at Jilid 5, the learned JC had this to say:

> 34. Terdapat keterangan daripada SP1 yang membuat pemerhatian dari dalam keretanya yang diletakkan berdekatan dengan tempat kejadian 1, Tertuduh 1 dilihat SP1 sedang berjalan kaki bersama-sama dengan Tertuduh 2 menuju ke restoran India. Menurut pemerhatian SP1 Tertuduh 1 sedang membawa sebuah beg berwarna hitam (eksh. P24) di tangan kanannya, yang kemudiannya didapati mengandungi dua ketulan mampat daundaun kering yang disyaki Cannabis dengan berat 1843 gram (Cannabis A). Menurut keterangan yang dikemukakan pandangan SP1 tidak terhalang oleh apa-apa objek dan kawasan tersebut mempunyai pencahayaan yang cukup bagi membolehkan SP1 membuat pemerhatian dengan berkesan. Pada masa tersebut SP1 mengesahkan tidak terdapat orang lain di tempat kejadian 1 selain daripada Tertuduh 1 dan Tertuduh 2.
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> 35. Keseluruhan keterangan SP1 mengenai apa yang berlaku ditempat kejadian 1 sehingga Tertuduh 1 dan Tertuduh 2 ditangkap disokong oleh SP7 yang turut berada dalam kereta dan sama-sama membuat pemerhatian terhadap Tertuduh 1 dan Tertuduh 2. Keterangan SP1 dan SP7 dengan jelas menunjukkan ekshibit P24 dan kandungannya P26 & P27 (Cannabis A) berada dalam kawalan dan pemilikan sebenar Tertuduh 1. Fakta kes juga menunjukkan Tertuduh 1 ditangkap secara redhanded dan dengan jelas mempunyai kawalan dan jagaan terhadap Cannabis A."

[27] And in regard to the appellant's knowledge, the learned JC paid particular attention to the evidence of SP1 and SP7 when both of them described the conduct of the appellant when confronted by the police party. It must be recalled that the appellant tried to flee from the scene of the crime when SP1 went

after him. A struggle ensued and this resulted in the black plastic bag (exh. "P24") slipping out of the appellant's hand and dropped onto the road. From this simple set of facts, the learned JC was of the view that the appellant's demeanour and conduct are relevant and admissible under s. 8 of the Evidence Act 1950 to show that the appellant was aware of the contents of the drugs in the black plastic bag (exh. "P24") and must have had knowledge of the drugs in his possession. In the absence of any reasonable explanation by the appellant, the combined effect of the appellant's conduct are sufficient, in law, for the learned JC to make an affirmative finding that the appellant had *mens rea* possession of the drugs that he was carrying. Indeed the learned JC took this course of action when she aptly said at pp. 429 to 430 of the appeal record at Jilid 5:

> 40. Pada tahap ini mahkamah menerima keterangan SP1 dan SP7 iaitu pegawai serbuan yang berada di tempat kejadian 1. SP1 dalam keterangannya juga menyatakan bahawa apabila SP1 memperkenalkan diri sebagai polis Tertuduh 1 telah membuat percubaan untuk melarikan diri dan telah berlaku pergelutan sehingga beg plastik hitam (eksh. P24) yang berisi Cannabis A terlepas daripada tangan kanan Tertuduh 1 dan terjatuh ke atas jalanraya. Tertuduh 1 hanya berjaya ditahan selepas pergelutan tersebut.
>
> 41. Tindakan dan reaksi Tertuduh 1 pada masa tangkapan ini memberi inferens mengenai pengetahuan Tertuduh 1 berhubung barang yang sedang dibawanya ialah barang salah iaitu Cannabis A seberat 1843 gram. Perilaku Tertuduh 1 yang membuat percubaan untuk melarikan diri sehingga menyebabkan suatu pergelutan berlaku di antara Tertuduh 1 dengan SP1 dan pasukannya dengan jelas menunjukkan Tertuduh 1 mempunyai pengetahuan akan bentuk dan rupa barang yang dibawa dalam P24 ialah dadah berbahaya iaitu Cannabis. Oleh yang demikian keterangan SP1 dan SP7 mengenai perilaku Tertuduh 1 dapat ditafsirkan sebagai perilaku yang dimaksudkan dalam sek. 8 Akta Keterangan 1950 dan keterangan seumpama ini boleh diterima sebagai keterangan di mahkamah ini.

[28] Reference will now be made to some authorities germane to the occasion at hand. For starters, we will refer to the case of *Aedy Osman v. PP* [2011] 1 CLJ 273 FC, a decision of the Federal Court. That was a case where the appellant was seen walking towards the convenience store with a red bag slung over

his right shoulder. The Federal Court held that the trial judge, after maximum evaluation of the evidence, had rightly come to the finding that (i) the appellant had possession and control over the red bag and thus had knowledge of the contents therein and (ii) since the appellant had attempted to escape before he was apprehended the appellant must have known of the contents in the red bag for otherwise there was no reason for him to put up a struggle. The appellant's appeal was accordingly dismissed and his conviction and death sentence were affirmed by the Federal Court.

[29] Next, it would be the case of *Ouseng Sama-Ae v. PP* [2010] 6 CLJ 416 CA, a decision of the Court of Appeal. In that case, the demeanour of the appellant when confronted by ASP Ramli Muda (SP3) showed knowledge of the contents of the red bag carried by the appellant. That red bag containing the drugs was slung over the appellant's right shoulder. And when SP3 approached the appellant and introduced himself to the appellant as a police officer, the appellant began to shiver and urinated in his trousers. The appellant's conduct was held to be admissible under s. 8 of the Evidence Act 1950. The Court of Appeal dismissed the appellant's appeal and affirmed his conviction and death sentence.

[30] Finally, this would be followed by the case of *Parlan Dadeh v. PP* [2009] 1 CLJ 717 FC, a decision of the Federal Court. In that case, a team of police personnel had observed the appellant in a restaurant before arresting him. When the police identified themselves, the appellant looked shocked or stunned. The police then conducted a search on the person of the appellant and a black plastic bag was found tucked away in the front part of the jeans worn by him. Inside the black plastic bag, the police recovered a transparent plastic bag containing 436.2g of cannabis or ganja. In affirming the conviction and sentence of death, the Federal Court at p. 748 had this to say:

> (38) In this case the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s. 8 since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by he himself as required by s. 9. The court cannot, on its own, offer an explanation for his reaction. However, in his defence the appellant did not offer any explanation at all for his reaction upon being approached

by the police. It can therefore be validly used as evidence against him. The inference to be drawn from the evidence of conduct of the appellant against the background of the other evidence is that he knew what he was carrying (see *DPP v. Brooks* [1974] 2 All ER 840).

[31] In our judgment, the learned JC had rightly made an affirmative finding based on the evidence adduced that the appellant was in *mens rea* possession of the drugs before resorting to invoke the presumption of trafficking under s. 37(da)(vi) of the DDA. Once the elements of possession have been proved, the compelling presumption of trafficking must be invoked. The Federal Court in *Muhammed Hassan v. PP* [1998] 2 CLJ 170 FC, held that the operation of the compelling presumption of trafficking would be invoked once the elements of possession have been proved. At p. 190 of the report, the Federal Court had this to say:

> The 'deemed' state of affairs in s. 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody or control. Such presumptions as under s. 37(d) (and, for that matter, the one under s. 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s. 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie, presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word 'found' in the opening phrase of s. 37(da) connotes a finding after a trial by the court.

[32] The affirmative finding of *mens rea* possession by the learned JC before resorting to invoke the presumption of trafficking under s. 37(da)(vi) of the DDA in calling the appellant to enter his defence was correctly arrived at by the learned JC. It was in consonance with the law. At pp. 433 to 434 of the appeal record at Jilid 5, the learned JC had this to say:

> 47. Berdasarkan kepada keterangan-keterangan yang dihuraikan terdahulu daripada ini dan dengan berpandukan kepada autoriti-autoriti yang telah diputuskan sebelum ini mahkamah berpuashati Tertuduh 1 mempunyai pengetahuan mengenai barang yang dibawa dengan tangan kanannya pada tarikh,

masa dan di tempat sebagaimana yang dinyatakan dalam Pertuduhan 1. Jelas di sini intipati pemilikan melalui pemilikan sebenar tanpa bergantung kepada anggapan pemilikan statutori di bawah sek. 37(d) ADB dibuktikan (rujuk kes *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337). Sebagaimana yang telah saya huraikan sebelum daripada ini pihak pendakwaan juga telah berjaya membuktikan Tertuduh 1 mempunyai pengetahuan *mens rea* possession terhadap Cannabis A dipegang di tangan kanannya. Intipati 1 dan 2 telah berjaya dibuktikan oleh pihak pendakwaan.

48. Setelah mahkamah berpuashati bahawa P24 dan kandungannya, Cannabis A berada dalam milikan sebenar Tertuduh 1 dan Tertuduh 1 juga mempunyai pengetahuan mengenainya perkara selanjutnya yang hendak diberi pertimbangan oleh mahkamah ialah sama ada Tertuduh 1 mengedar dadah berbahaya tersebut seperti dalam Pertuduhan 1. Dalam factual matrix kes ini pihak pendakwaan dapat membangkitkan anggapan statutori bagi membuktikan intipati pengedaran Cannabis A oleh Tertuduh 1. Ini adalah kerana berat Cannabis A yang menjadi hal perkara dalam Pertuduhan 1 ialah 1843 gram sekaligus memberi peluang kepada pihak pendakwaan bergantung kepada anggapan di bawah s. 37(da)(vi) ADB yang memperuntukkan anggaran pengedaran bagi pemilikan Cannabis 200 gram atau lebih. Pendekatan ini telah diterimapakai oleh Mahkamah Persekutuan dalam kes *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 yang memutuskan ...

The Second Issue

[33] The appellant gave evidence on oath. The brunt of his defence was simply that he was asked by Paridah Wahid to get the black plastic bag (exh. "P24") from her room. It was Paridah Wahid who gave him the keys to the room and it was because of this that a bunch of keys (exh. "P18A to D") were seized from the right pocket of the appellant's trousers when he was arrested. The appellant denied that he had knowledge of the drugs inside the black plastic bag (exh. "P24") and that he was a mere innocent carrier for Paridah Wahid. According to the appellant, he walked back to Jalan Kem as per the charge carrying the black plastic bag (exh. "P24") to meet up with Paridah Wahid. At that time, there was a man and a woman on a motor scooter together with Paridah Wahid. The latter took possession of the black plastic bag (exh. "P24") from the appellant and handed it to one

of them who was on the motor scooter. At that juncture, the police party laid an ambush and the appellant saw the black plastic bag (exh. "P24") was thrown by one of them from the motor scooter and they then sped off.

[34] The defence of the appellant cannot stand in isolation. It must be determined by reference to the facts and circumstances prevailing in each particular case (*Ridwan v. PP* [2010] 4 CLJ 570; *Hoh Bon Tong v. PP* [2010] 5 CLJ 240; and *Wong Vui Chin v. PP* [2011] 3 CLJ 383). In our judgment, the appellant could not avail himself of the defence of innocent carrier because there was ample evidence to show that the appellant had knowledge of the drugs that he was carrying. The contemporaneous conduct of the appellant by fleeing the scene and putting up a struggle with the police party before the discovery of the drugs would have a direct bearing on the facts in issue and would have certainly damaged or whittled away the presumption of innocence on the part of the appellant. A reasonable tribunal appraised of the facts and after hearing this appeal would have concluded that the appellant was not an innocent carrier and that the appellant knew that he was carrying the drugs in the black plastic bag (exh. "P24") for the purpose of trafficking.

[35] In our judgment, the appellant sprung a surprise when he stated that the black plastic bag (exh. "P24") belonged to Paridah Wahid who had asked him to get the said bag for her from her room. This version was only brought up by the appellant when he was called upon to enter his defence for the first charge. At that juncture, it must be noted that the appellant together with Paridah Wahid had been acquitted and discharged without their defence being called for the second charge. During the entire prosecution's case, the defence suggested that the drugs belonged to someone else who had escaped but certainly not to Paridah Wahid. If it is true that the drugs belonged to Paridah Wahid and that he was asked to take the black plastic bag (exh. "P24") from Paridah Wahid's room, this defence should be raised at the earliest possible stage and ought to be categorically and specifically put to the prosecution's witnesses in order to test the veracity of the appellant's version.

[36] Indeed it would be strange if the appellant were to point an accusing finger at Paridah Wahid since both of them were facing the same fate at that time. It was only when the appellant and Paridah Wahid were acquitted and discharged at the close of the

A prosecution's case for the second charge, that the appellant - now facing the first charge alone, took a 180degree turn and pushed all the blame to Paridah Wahid.

[37] It goes without saying that the introduction of this B contradictory version more in the nature of a belated disclosure at this very late stage impacted on the appellant's credibility and destroyed the *bona fide* of his entire defence. In this context, perhaps it is appropriate to refer to the Federal Court case of *Tan Kim Ho & Anor v. PP* [2009] 3 CLJ 236 FC, where at C p. 255 it was stated that:

> (36) This is however not to say that there is any burden placed on the accused to disprove any guilt or to prove innocence. It is only assessing the credibility of a witness, in this case the second appellant's credibility. In order to determine D whether an accused was telling the truth, one of the consideration (sic) is whether he had indicated his defence during the prosecution's case.

[38] The High Court in *PP v. Badrulsham bin Baharom (supra)* held that the failure of the accused to inform the raiding officers E that the white plastic bag belonged to Noor Azian at the time of his arrest and only revealing this information during the interrogation two hours after his arrest goes some way to support the case for the prosecution.

F **[39]** The Federal Court in *Teng Howe Sing v. PP* [2009] 3 CLJ 733 FC vigorously applied the principle set out in *Badrulsham*'s case and concluded at p. 750 that:

> (32) Applying the principle in *Badrulsham*'s case to the facts of G the instant case, the learned trial judge was correct to conclude that the appellant had two opportunities to provide information about 'Ho Seng', ie, at the time of his arrest and five days later during recording of his cautioned statement but he failed to do so. We are therefore of the view that in the circumstances, the appellant's failure to provide relevant H information about 'Ho Seng' for the police to carry out a thorough investigation into the probability of his defence, entitled the learned trial judge to disbelieve him.

[40] Now, it must be recalled that Paridah Wahid was arrested I together with the appellant. If at all the drugs belonged to her, the appellant ought to have revealed this very pertinent fact to SP1 at the first instance when he was arrested or when he was

interrogated by SP6 after his arrest or during the entire prosecution's case. The appellant's failure must be construed against him. There are no two ways about it.

The Third Issue

[41] There was no mixed-up of the cannabis found at the road side of Jalan Kem as per the first charge by the government chemist (SP5) with the cannabis that was found in room no: 4, Tingkat 2, no: 137, Jalan Kem, Pelabuhan Klang, Selangor during the chemical analysis by SP5. In our judgment, having perused through the evidence of SP5 with a fine toothcomb, SP5 had in fact conducted the chemical analysis for each slab separately.

[42] SP5 received the following exhibits from SP6 as reflected at pp. 121 to 122 of the appeal record at Jilid 2:

Q: Ada kamu memeriksa kandungan barang kes tersebut?

A: Saya telah memeriksa kandungan kotak 'A' dan mendapati di dalamnya berisi.

SP5: Pohon rujuk pada laporan kimia. Mendapatinya di dalamnya berisi:

1. Beg plastik hitam 'A' dan bahan tumbuhan berwarna perang A1 dan A2.

2. Satu beg plastik bertanda 'A' berisi dua ketulan mampat tumbuhan dibalut plastik diikat dengan pita pelekat berwarna perang bertanda A1 dan A2.

3. Satu kotak merah bertanda 'B' berisi satu ketulan mampat tumbuhan dibalut dengan pita pelekat dan salotape berwarna perang.

[43] And at p. 125 of the appeal record at Jilid 2, SP5 explained the quantitative process to determine the nett weight of each cannabis slab:

Q: Ada timbang barang kes untuk dapatkan berat kasar sebelum jalankan analisa?

A: Saya mulakan dengan menimbangkan berat kasar setiap ketulan iaitu berat ketulan dan pembalut. Kemudian saya telah mengeluarkan setiap ketulan dan menimbangkan pembalut sahaja. Berat bersih saya dapati dengan menolak berat kasar dengan berat pembalut.

Q: Berapa berat kasar bagi setiap barang kes tersebut?

A: Berat kasar dan pembalutnya:

	Berat Kasar	Berat Bersih
Beg hitam	A1 – 964.55 gram	913.02 gram
	A2 – 980.43 gram	930.06 gram
Beg plastik lutsinar	A1 – 970.80 gram	882.96 gram
	A2 – 962.27 gram	876.95 gram
Kotak B	B1 – 976.85 gram	928.97 gram

Q: Adakah alat penimbang berfungsi dengan baik?

A: Alat penimbang berfungsi dengan baik. Alat timbang telah dikalibrasi dengan sijil kalibrasi yang sah.

[44] Continuing at pp. 126 to 127 of the appeal record at Jilid 2, SP5 explained the qualitative process that was adopted and more importantly SP5 testified that she had analysed each cannabis slab separately. Her testimony went along these lines:

Q: Apakah ujian yang dijalankan ke atas ketulan-ketulan dadah tersebut?

A: Sebelum memulakan analisis, saya telah meleraikan ketulan mampat tersebut secara berasingan bagi setiap ketulan. Kemudian saya telah jalankan empat kaedah analisis bagi setiap leraian ketulan juga secara berasingan.

1. Pemeriksaan fizikal - mata kasar. Saya telah jalankan pemeriksaan ke atas keseluruhan tumbuhan iaitu 100%. Saya dapati kesemua tumbuhan terdiri daripada tumbuhan yang sama dan tidak ada bahan lain.

2. Ujian Mikroskopik menggunakan alat stereomicroscope. Ini juga saya lakukan terhadap keseluruhan bahan iaitu 100%. Hasil daripada pemeriksaan ini saya dapati bahan ini mempunyai ciri-ciri mikroskopik cystolith hair, glandular hair, simple hair dan globula resin terang. Ciri-ciri ini memenuhi ciri mikroskopik bagi tumbuhan daripada jenis cannabis.

Saya telah jalankan ujian keempat - Thin Layer Chromotography (TLC). Hasil ujian ini saya mengesahkan resin daripada tumbuhan mempunyai tiga cannabinoids utama iaitu THC (Tetra Hydrocannabinol), Cannabinol (CBN) dan CBT iaitu Cannabidiol. Keputusan keempat-empat ujian mengesahkan bahawa keseluruhan bahan tumbuhan adalah cannabis di bawah sek. 2 ADB 1952.

[45] It is trite law that the evidence of the government chemist must be accepted at face value. This trite principle of law must be applied to the evidence of SP5. Consequently, this issue has no basis at all.

Conclusion

[46] Taking the evidence of the defence and considering it in the context of the whole case, we found it to be incapable of belief and we also found that it was not one that was probable under the circumstances. It is safe to convict the appellant on the strength of the overwhelming evidence against him. The defence of the appellant had fallen far short of rebutting the presumption of trafficking on the balance of probabilities and as such, it had not raised a reasonable doubt as to his guilt which the prosecution had established beyond reasonable doubt. There are no appealable errors warranting appellate intervention.